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In the Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF MISSISSIPPI AND
MISSISSIPPI PUBLIC SERVICE COMMISSION, PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly upheld the decision of the Federal Energy Regulatory Commission allocating certain costs of generating electricity among utilities that share an integrated nuclear power system in proportion to each utility's demand on that system.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 5a-10a) is reported at 875 F.2d 903. The order of the Federal Energy Regulatory Commission allocating costs among petitioners and other utilities (Pet. App. 11a-38a) is reported at 41 F.E.R.C. ¶ 61,238. The order of the Federal Energy Regulatory Commission denying rehearing (Pet. App. 39a-45a) is reported at 42 F.E.R.C. ¶ 61,091. An earlier opinion of the court of appeals remanding the case to the Federal Energy Regulatory Commission (Pet. App. 46a-137a) is re-

ported at 808 F.2d 1525. The initial order of the Federal Energy Regulatory Commission and its order on rehearing are reported at 31 F.E.R.C. ¶ 61,305, and 32 F.E.R.C. ¶ 61,425, respectively.

JURISDICTION

The judgment of the court of appeals was entered on May 26, 1989. A petition for rehearing was denied on August 28, 1989. Pet. App. 1a-2a. On November 14, 1989, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including December 27, 1989, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners, the State of Mississippi and the Mississippi Public Service Commission, represent the consumers and state regulators of Mississippi Power & Light Company (MP & L), one of four operating public utilities that comprise the Middle South Utilities system (MSU). MSU, an integrated power pool, spent several billion dollars building the Grand Gulf 1 nuclear power plant, a project that proved to be "catastrophically uneconomical." Pet. App. 48a. Upon reviewing rate agreements filed by MSU on behalf of its constituent utilities,[1] the Federal Energy Regula-

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[1] The Commission reviewed those agreements under Sections 205(a) and (b) and 206(a) of the Federal Power Act, 16 U.S.C. 824d(a) and (b) and 824e(a).

Section 205(a) of the Federal Power Act, 16 U.S.C. 824d(a), provides, in pertinent part:

> All rates and charges made, demanded, or received by any public utility for or in connection with the transmis-

tory Commission allocated those investment costs among the four utilities in proportion to each utility's demand for the electricity generated by the integrated power pool. This case involves petitioners' latest challenge to the Commission's order requiring MP & L to pay for its proportional share of those allocated costs.[2]

> sion or sale of electric energy subject to the jurisdiction of the Commission * * * shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

Section 205(b) of the Federal Power Act, 16 U.S.C. 824d(b), further provides:

> No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

Section 206(a) of the Federal Power Act, 16 U.S.C. 824e(a), provides that when the Commission determines after a hearing that

> any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affect[ing] such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. * * *

[2] Over the last two Terms, the Court has reviewed other aspects of this prolonged litigation. See *New Orleans Pub. Serv., Inc.* v. *Council of the City of New Orleans*, 109 S. Ct.

1. MSU consists of four utility operating companies, Louisiana Power & Light (LP & L), New Orleans Public Service, Inc. (NOPSI), Arkansas Power & Light Company (AP & L), and MP & L. Each utility sells electricity in separate service areas in Louisiana, Arkansas, Missouri, and Mississippi. Wholesale transactions among the four utilities "have been governed by a succession of three 'System Agreements,' which were filed with FERC in 1951, 1973, and 1982." *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 108 S. Ct. 2428, 2431 (1988).[3] Those agreements "have provided the basis for planning and operating the companies' generating units on a single-system basis and for equalizing cost imbalances among the four companies." *Ibid.*[4]

In the late 1960s, MSU sought to meet projected increases in demand and to diversify its fuel mix by adding nuclear and coal units to its oil and gas fired power plants. MSU first pursued a plan under which each operating utility would build and operate a nuclear facility. In 1974, AP & L brought on line the first of these projected nuclear plants, the Arkansas

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2506 (1989); *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 108 S. Ct. 2428 (1988).

[3] The Commission exercised jurisdiction over those agreements under Section 206(a) of the Federal Power Act, 16 U.S.C. 824e(a). See note 1, *supra*. The court of appeals rejected petitioners' challenge to the Commission's assertion of jurisdiction, see Pet. App. 73a-102a; *Mississippi Indus.* v. *FERC*, 808 F.2d 1525, 1539-1553 (D.C. Cir. 1987), and this Court denied petitions for a writ of certiorari to review that ruling, *Arkansas Pub. Serv. Comm'n* v. *FERC*, 484 U.S. 985 (1987). Accordingly, petitioners no longer contest the Commission's authority to review this ratemaking matter.

[4] Local regulatory authorities, such as petitioner Mississippi Public Service Commission, regulate each utility's retail sales.

Nuclear One stations (ANO 1 and ANO 2). The plan further provided that MP & L would build two nuclear power facilities at Port Gibson, Mississippi, Grand Gulf 1 and Grand Gulf 2. A number of factors, however, including construction problems endemic to the nuclear industry, regulatory delays after the Three Mile Island disaster, inflation, and reduced demand, interrupted MSU's plans to build additional nuclear facilities. These problems particularly hindered MP & L's efforts to complete the Grand Gulf 1 project. See *Mississippi Power & Light Co.*, 108 S. Ct. at 2432-2433; Pet. App. 54a-56a.

When it became apparent that MP & L could not finance Grand Gulf 1 on its own, MSU created a new entity, Middle South Energy, Inc. (MSE) (now known as System Energy Resources, Inc.), as a vehicle for financing the plant. As this Court has described the problem, "the cost of completing Grand Gulf construction was about six times greater than had been projected. Consequently, the wholesale cost of Grand Gulf's power greatly exceeds that of power produced in other [MSU] system facilities." *Mississippi Power & Light Co.*, 108 S. Ct. at 2432-2433 (footnote omitted).

2. In 1982, MSU filed with the Commission two separate agreements concerning the allocation of the cost of Grand Gulf's power. The first agreement, filed in April 1982, was a "System Agreement, which set the general rules governing transactions between the operating companies, including capacity equalization payments and the rates governing the exchange of energy between the operating companies." Pet. App. 60a. The second agreement, filed in June 1982, was the "Unit Power Sales Agreement" (UPSA), which governed "the sales of Grand Gulf capacity and energy by MSE to the four operating companies." *Ibid.*

The Commission assigned each matter for a hearing before a different Administrative Law Judge. *Ibid.*

a. On February 3, 1984, ALJ Liebman issued his opinion concerning the filed UPSA and its proposed allocation of Grand Gulf investment costs. *Middle South Energy, Inc.*, 26 F.E.R.C. ¶ 63,044 (1984). Although all four operating companies had executed the agreement, the UPSA provided that MSE would sell Grand Gulf capacity and energy only to three of the four utilities, LP & L, MP & L, and NOPSI. Judge Liebman concluded that the agreement's exclusion of AP & L rendered the UPSA "unduly discriminatory" under Section 206(a) of the Federal Power Act, 16 U.S.C. 824e(a). In his view, the UPSA, as submitted, would result in "most of the high cost of nuclear power on the Middle South system * * * be[ing] borne by Louisiana ratepayers, while all the low cost nuclear power would benefit Arkansas ratepayers." 26 F.E.R.C. ¶ 63,044, at 65,107. Judge Liebman also noted that the UPSA would have the result, "in the longer run * * * [of] substantially higher costs for LP&L, MP&L and NOPSI than for AP&L." *Ibid.* In light of the integrated nature of the MSU system, Judge Liebman found no factual differences between the operating companies to warrant this disparity. 26 F.E.R.C. ¶ 63,044, at 65,108.

Having found discriminatory treatment in the UPSA, Judge Liebman chose an allocation of Grand Gulf power that would have the effect of assigning "each operating company a share of the cost for nuclear capacity which is roughly proportionate to that company's relative share of system demand." 26 F.E.R.C. ¶ 63,044, at 65,109. As summarized by the court of appeals, Judge Liebman "justified his exclusive focus on nuclear capacity costs—rather than on equalizing the costs of all capacity investment or, even

more sweeping, equalizing all generating costs—by claiming that the differences among non-nuclear base load generation costs were minor compared to the cost differences among the nuclear generating facilities." Pet. App. 63a-64a (footnote omitted); see 26 F.E.R.C. ¶ 63,044, at 65,110.

b. Approximately one year later, on February 4, 1985, ALJ Head issued his opinion regarding whether the 1982 System Agreement should be approved as filed, or whether all production costs on the MSU system (including those of Grand Gulf), should be fully equalized. *Middle South Services, Inc.*, 30 F.E.R.C. ¶ 63,030 (1985).[5] Judge Head rejected any production cost equalization options because such terms would conflict with the general "pattern of autonomy * * * particularly as to * * * specific plant site locations, fuel and financing" that characterized the four operating companies in the MSU system. 30 F.E.R.C. ¶ 63,030, at 65,168. Judge Head noted, however, that the Grand Gulf project was an "anomaly" in the MSU system: "Grand Gulf from its inception was planned, presented to the licensing authorities and constructed as a system plant not only to serve the needs of MP & L but to serve the needs of all the operating companies on the system." 30 F.E.R.C. ¶ 63,030, at 65,170.

Accordingly, Judge Head rejected the 1982 System Agreement as filed. Instead he decided, as had Judge Liebman (see p. 6, *supra*), to "integrate Grand Gulf into the 1982 System Agreement by having each of the four operating companies pay for the production costs of the Grand Gulf facility based on the ratio

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[5] As explained by the court of appeals, the concept of "equalization" means that "each operating company would have to pay a share proportionate to its share of system demand." Pet. App. 64a n.36.

that the individual operating company's total annual demand bears to the total annual system demand." 30 F.E.R.C. ¶ 63,030, at 65,172. Unlike Judge Liebman, however, Judge Head determined that the Grand Gulf allocation should be without regard to any other nuclear investment cost, and should fluctuate from year to year in order to track directly each company's relative demand. *Ibid.*

3. In June 1985, the Commission issued its order on consolidated review of each ALJ's decision. *Middle South Energy, Inc.*, 31 F.E.R.C. ¶ 61,305 (1985). At the outset, the Commission affirmed its jurisdiction to review both the 1982 System Agreement and the UPSA. The Commission then agreed with the ALJs that, since MSU was an "integrated electric system," allowing MP & L to "divorce itself" from its system responsibilities would amount to undue discrimination in violation of the Federal Power Act. 31 F.E.R.C. ¶ 61,305, at 61,645.

Turning to the cost allocation issue, the Commission rejected Judge Head's conclusion that the Grand Gulf project was an anomaly in the MSU system. Instead, the Commission determined that since the governing MSU "Operating Committee" ultimately made decisions concerning the Grand Gulf project's size, location, and timing, in accordance with the overarching plans and needs of the entire MSU system, construction and operation of the Grand Gulf project was not a departure from past practice. 31 F.E.R.C. ¶ 61,305, at 61,645-61,653. Consequently, the Commission adopted Judge Liebman's allocation of the Grand Gulf investment costs so that each operating company would contribute proportionately to the system's investment in all nuclear capacity, including not only Grand Gulf 1, but also other nuclear facilities, such

as AP & L's ANO 1 and ANO 2. 31 F.E.R.C. ¶ 61,305, at 61,655.[6]

4. In January 1987, the court of appeals denied petitions for review. Pet. App. 46a-137a; *Mississippi Indus.* v. *FERC*, 808 F.2d 1525 (D.C. Cir. 1987).[7] The court of appeals upheld, as "more than adequately supported by the record," the Commission's findings that the MSU system was fully integrated in its operations. Pet. App. 107a. The court specifically noted the substantial record evidence that the MSU "Operating Committee" had made "major decisions concerning general timing, location and size of plant additions, in view of the overall needs of the system." Pet. App. 107a (quoting 31 F.E.R.C. ¶ 61,305, at 61,650). And that evidence, in the court's view, also supported the Commission's determination that any differences between the operation of Grand Gulf 1 and the MSU system's other nuclear plants stemmed solely from differences in financing arrangements necessitated by MP & L's inability to finance the Grand 1 project on its own. Pet. App. 108a-109a.[8] Accord-

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[6] On rehearing, the Commission clarified its jurisdictional ruling, and otherwise affirmed its allocation of Grand Gulf costs. *Middle South Energy, Inc.*, 32 F.E.R.C. ¶ 61,425 (1985).

[7] As a threshold matter, the court of appeals rejected various challenges to the Commission's authority to restructure the parties' agreed-upon allocations, holding that the Federal Power Act gave the Commission the necessary authority. Pet. App. 73a-102a. As the court succinctly explained, "because the allocation of Grand Gulf capacity and costs * * * significantly *affects* the wholesale rates at which operating companies exchange energy due to the combined effect of the UPSA and the 1982 System Agreement, that allocation is plainly within Commission jurisdiction." *Id.* at 78a.

[8] The court of appeals concluded that the record supported the Commission's rejection of ALJ Head's determination that the Grand Gulf project was an "anomaly." Pet. App. 108a.

ingly, the court of appeals held that "the Commission's conclusion that the UPSA and the 1982 System Agreement, as filed, were unduly discriminatory [under Section 206(a) of the Federal Power Act, 16 U.S.C. 824e(a)] follows almost as a matter of course." *Id.* at 109a.

Judge Bork concurred with "the majority's reasoned analysis of the jurisdictional challenges," but dissented on the merits because "the Commission ha[d] failed adequately to explain two critical issues." Pet. App. 135a. The Commission, in Judge Bork's view, had "not explained adequately its criteria for determining what is 'undue discrimination' or why the course it has chosen is not also unduly discriminatory," since "[u]nder the Commission's remedy, * * * nuclear capacity costs remain vastly disparate * * *." *Ibid.* In addition, Judge Bork questioned the Commission's explanation for allocating the capacity costs of all nuclear plants, rather than limiting the allocation to Grand Gulf and another completed nuclear facility, or expanding it to the coal plants, because "the cost overruns were not unique to all nuclear plants; they were unique only to Grand Gulf and Waterford III. The investment costs of the ANO units were comparable to the investment costs of the coal units." *Id.* at 136a-137a.

5. On rehearing in June 1987, the court of appeals adopted Judge Bork's analysis on the allocation issue, and thus remanded the case to the Commission "for reconsideration of the decision to equalize the capacity costs of all nuclear plants, and for an explanation of the criteria used to determine what constitutes 'undue discrimination' and of why the Commission's ultimate decision is not unduly discriminatory." *Mississippi Indus.* v. *FERC*, 822 F.2d 1104, 1105 (D.C. Cir. 1987) (per curiam).

6. In November 1987, the Commission issued its order responding to the court of appeals' remand, and reaffirmed the decision to equalize the investment costs of all nuclear plants on the MSU system. Pet. App. 11a-38a.

The Commission explained that the disparity in capacity costs remaining after its allocation was not "undue discrimination" within the meaning of the Federal Power Act, because the prior finding of discrimination and the remedy the Commission fashioned had been based not on megawatts of *capacity*, but "on megawatts of average *demand* placed on the Middle South pool by each of the four operating companies." Pet. App. 19a (emphasis in original). The Commission made clear that this methodology was consistent with the Commission's traditional approach to the allocation of utility investment costs "on the basis of demand responsibility, i.e., the ratio of the purchaser's demand to the system's demand." *Ibid.*[9]

Under the Commission's allocation, the percentages of average nuclear cost per megawatt of average demand were roughly equal for the four operating companies, while under the UPSA, those percentages had been radically different. Pet. App. 21a-23a. The Commission therefore determined that its allocation, correctly measured in terms of demand rather than in terms of capacity, had indeed eliminated the dispari-

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[9] In this context, the Commission relied on longstanding precedent. See, *e.g.*, *Kansas Gas & Elec. Co.* v. *FERC*, 758 F.2d 713, 714 (D.C. Cir. 1985); *Cities of Bethany* v. *FERC*, 727 F.2d 1131, 1135-1137 (D.C. Cir.), cert. denied, 469 U.S. 917 (1984); *Cities of Batavia* v. *FERC*, 672 F.2d 64, 80-81 (D.C. Cir. 1982); *Second Taxing Dist.* v. *FERC*, 683 F.2d 477, 480 (D.C. Cir. 1982); *Commonwealth Edison Co.*, 15 F.E.R.C. ¶ 63,048 (1981), aff'd in part, 23 F.E.R.C. ¶ 61,219 (1983).

ties in nuclear investment costs of the operating companies. See *id.* at 21a-24a.[10] Turning to the court of appeals' question regarding the governing criteria for finding undue discrimination, the Commission stated that the decisive criteria were "firmly embedded in the factual setting" presented by the MSU system and the interplay of the 1982 System Agreement and the UPSA. *Id.* at 24a.[11]

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[10] The Commission explained that since an electric utility system creates generating capacity in order to meet demand, the cost of capacity should be allocated throughout that system in proportion to demand. See *Arizona Pub. Serv. Co.*, 23 F.E.R.C. ¶ 61,419, at 61,931 (1983). In other words, "[a] cost equalization approach that fails to consider demand would ignore the very determin[ant] that controls the need for various levels of capacity." Pet. App. 20a. On the other hand, the Commission explained, analysis of capacity is not "a meaningful method" for determining whether investment costs are allocated in a nondiscriminatory manner, because that analysis "does not establish whether the responsibility for such costs matches the burden which each operating company, and, in turn, its customers, places on the MSU pool." *Id.* at 21a.

[11] As the Commission explained in more detail:

> Explicitly stated, our criteria for determining when undue discrimination exists in this case were that each operating utility should contribute investments to meet the capacity needs of the system in the long term, and that each operating utility should share in the overall capacity costs of the system in rough proportion to the benefits it receives (i.e., that its demand is met) from that system. Given the tremendous disparities in size and loads among the operating utilities, the only legitimate way to ensure that approximate parity between costs borne and benefits received is to ensure approximate equalization of cost responsibility on a per unit of demand basis. In other words, an allocation scheme that would not achieve a rough equalization of production costs on a demand basis would be, in the absence of a rational

The Commission then explained why it had allocated the capacity costs of all nuclear plants, rather than either limiting the allocation to the costs of the Grand Gulf and Waterford projects, or expanding the allocation to include capacity costs of coal facilities. The Commission noted that the "disparity in nuclear investment costs (on a demand basis) among the MSU pool members * * * [had] disrupted the [system's prior] pattern of rough equalization of production costs." Pet. App. 28a. Moreover, these disparities were the result of happenstance: "The fact that AP&L's ANO units cost less than Gulf or Waterford 3 is due * * * simply to differences in timing as to when the units were built and by which company." *Ibid.* At the same time, "[i]nsofar as they were built for the benefit of the entire System, the ANO units stand on the same footing as the Grand Gulf and Waterford 3 units." *Ibid.* The Commission therefore concluded that, "in order to restore the pattern of rough equalization of production costs, it is appropriate to focus on the total investment costs of *all* the nuclear plants built on the MSU system." *Ibid.*[12]

7. In May 1989, the court of appeals, in a brief per curiam order, again denied petitions for review, holding that "FERC's action was both rational and within the Commission's range of discretion to remedy unduly discriminatory rates." Pet. App. 10a. After noting the initial remand order, the court of appeals

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explanation, unduly discriminatory because there would be basis for disparity among similarly situated entities. Pet. App. 24a.

[12] The Commission later denied petitions for rehearing filed by various parties to the ratemaking proceedings. See Pet. App. 39a-45a.

concluded that the record supported the Commission's decision on remand:

> [F]irst, the Commission has fully and adequately reconsidered, on remand, its decision to equalize the capacity costs of all nuclear plants; second, FERC has adequately explained its criteria for determining what constitutes "undue discrimination;" and, third, the Commission's judgment in this case is not unduly discriminatory.

Id. at 8a.[13]

The court of appeals rejected petitioners' claim that the Commission's allocation failed properly to match costs and benefits. The court accepted the Commission's conclusion that "a proportionate allocation of nuclear investment costs was justified by the indirect benefits provided by the nuclear units to all the companies." Pet. App. 9a. In that regard, the court pointed out that "the presence of the nuclear units in the integrated system helps to achieve economies of scale, reductions in reserve requirements, increased reliability and efficiencies in operation." *Ibid.*[14]

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[13] To the extent the petitions for review sought to raise jurisdictional issues, the court of appeals summarily rejected those claims because it had "already * * * upheld the Commission's exercise of jurisdiction in this case, and that issue [was] not properly the subject of further litigation." Pet. App. 8a (citing *Mississippi Indus.* v. *FERC*, 808 F.2d 1525 (D.C. Cir.), cert. denied, 484 U.S. 985 (1987)).

[14] Lastly, the court of appeals observed that petitioners offered no alternative to the Commission's allocation "other than to return to a method that FERC rejected with [the court's] approval." Pet. App. 10a (citing *Mississippi Indus.* v. *FERC*, 808 F.2d at 1555-1556).

ARGUMENT

In the latest chapter of this prolonged litigation, the Commission applied standard utility ratemaking principles to a unique and complicated factual situation, allocating wholesale rates among the members of a power pool in order to prevent undue discrimination prohibited by the Federal Power Act. The court of appeals' decision, upholding the Commission's allocation, also applied those settled principles to the administrative record. That decision is correct and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, further review of petitioners' contentions regarding the Commission's allocation of costs among the four utilities in the MSU system is not warranted.

1. Petitioners contend that this case presents "important questions" concerning the scope of judicial review of Commission orders because the court of appeals, by giving "total deference to an administrative ratemaking decision," "seems to have abdicated its limited but essential review function under the Federal Power Act." Pet. 14, 15, 16. But petitioners do not point to anything in the record suggesting that the court of appeals applied any doctrine other than the well-settled principle of deference to reasonable administrative decisionmaking. See, *e.g.*, *Permian Basin Area Rate Cases*, 390 U.S. 747, 792 (1968); *Cities of Bethany* v. *FERC*, 727 F.2d 1131, 1138 (D.C. Cir.), cert. denied, 469 U.S. 917 (1984). To the extent petitioners base their claim on the court's concise opinion after the remand, that claim must fail where the court of appeals had already fully canvassed the factual and legal issues in the case in its initial opinion. See Pet. App. 46a-137a.

Indeed, the only issue properly before the court of appeals was whether the Commission had carried out the additional inquiries specified in the court's remand order in a reasoned fashion. The court determined that the Commission had fully discharged its duty. See, *e.g.*, Pet. App. 8a. That sort of determination—whether an agency has complied with the court of appeals' mandate—merits no further review by this Court. See, *e.g.*, *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895); *Litman* v. *Massachusetts Mut. Life Ins. Co.*, 825 F.2d 1506, 1510-1511 (11th Cir. 1987) (en banc), cert. denied, 484 U.S. 1006 (1988).

2. Petitioners also contend that the Commission's allocation order violates the Federal Power Act because "Mississippi customers of MP & L and New Orleans customers of NOPSI, who share none of the benefits of the ANO units in Arkansas or the Waterford III unit in Louisiana, necessarily subsidize part of the Araknsas-Louisiana customers' rates for using the ANO-Waterford output." Pet. 15. In support of that argument, petitioners cite (Pet. 14) Justice Scalia's concurrence in *Mississippi Power & Light Co.*, 108 S. Ct. at 2445, where he referred to the Commission's responsibility "to protect against allocations that have the effect of making the ratepayers of one State subsidize those of another."

As both the court of appeals (Pet. App. 9a) and the Commission (*id.* at 35a) determined, however, petitioners' claim rests on the false premise that "the only benefit provided by a generating unit is a direct entitlement to capacity from that unit." *Ibid.* As the Commission explained, petitioners' narrow conception of "benefit" is unrealistic:

> An important benefit from generating capacity is that demand is met. In addition, in the case of

> the centrally dispatched MSU System, all companies benefit from the greater diversity in System fuel mix which results from the existence of the nuclear units. Finally, as a result of constructing the System's generating facilities on an integrated basis, the System's members are able to achieve economies of scale in building new generation, reductions in reserve requirements, increased reliability, and efficiencies in operation.

Ibid. Petitioners do not seriously challenge the court of appeals' conclusion that the record amply supported these determinations. *Id.* at 9a.[15]

3. Lastly, petitioners assert that this case merits further review because of "[t]he absence of controlling precedent" applying the Federal Power Act's antidiscrimination requirements to "an interstate intra-system scheme of allocating cost and benefits of nuclear power plants * * *." Pet. 18. The Commission's task here, however, was to apply the "long standing policy" of electric rate regulation that "[p]roperly designed rates should produce revenues from each class of customers which match, as closely as practicable, the costs to serve each class or individual customer." *Alabama Elec. Coop.* v. *FERC*, 684 F.2d 20, 27 (D.C. Cir. 1982) (emphasis omitted). And the Commission's orders—together with the court of appeals' decision—scarcely "set[] a national pattern for allocating the high and often excessive costs of nuclear energy." Pet. 19. To the contrary, the

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[15] To the extent petitioners raise claims of impermissible interstate subsidization (Pet. 16-18), those claims must also fail since the Commission's order, when properly evaluated in terms of investment costs per average units of demand on the MSU system, in fact eliminated the interstate allocation disparity and thus avoided any such "subsidization." Pet. App. 21a-22a.

factual background and lengthy proceedings make clear that this case is the particular result of a unique set of facts—the specific organization of the Middle South Electric System and the peculiar financial troubles that beset the System's construction of certain nuclear facilities.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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* The Solicitor General is disqualified in this case.

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